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Nos. 90-201, 90-202, 90-205

Supreme Court, U.S.
FILED
NOV 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COLONIAL VILLAGE, INC.,
Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

MOBIL LAND DEVELOPMENT CORPOPORATION,
Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

MARVIN J. GERSTIN and MARVIN GERSTIN ASSOCIATES, INC.,
Petitioners,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION AND SUPPLEMENTAL APPENDIX TO PETITIONS

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[Note: all parent and subsidiary companies of petitioners are listed in the petitions in Nos. 90-201, 90-202 and 90-205.]

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REPLY TO BRIEF IN OPPOSITION

Petitioners Colonial Village, Inc. ("Colonial"), Mobil Land Development Corporation ("MLDC"), Marvin J. Gerstin and Marvin Gerstin Associates, Inc. (collectively "Gerstin") submit this reply in response to the arguments raised by Respondents in their Brief in Opposition ("Br.Opp."). Additional pertinent materials from the proceedings below are included in the Supplemental Appendix ("S.App.").

A. The Four-Way Split in the Circuits Over the Effect of Partial Consolidation On Appellate Jurisdiction Is Properly Presented.

Respondents assert that the question of appellate jurisdiction raised by the Gerstin petitioners is without moment, since respondents filed two appeals, at least one of which gave the court of appeals jurisdiction.

It is the Gerstin argument, however, that when the first appeal, admittedly timely as to the Gerstin petitioners was dismissed without challenge from respondents, that case was over. The second appeal came too late, and the appellate court by that time had no jurisdiction over Gerstin.

Whether Gerstin's position prevails, unfortunately, depends on which federal judicial circuit the case arises in, and which of four competing approaches to the effect of partial consolidation is followed in that circuit. (Gerstin Pet. 10-13). The reason certiorari should be granted is because the outcome ought to be the same nationwide.

In its one-paragraph treatment of the issue, respondents' brief asserts, in essence, that simply because respondents filed separate notices of appeal after each district court ruling, no issue of appellate jurisdiction exists. (Br.Opp.8, ¶11).

That argument begs the question.

The district court's May 22, 1987 judgment fully and finally resolved every claim asserted in Civil Action 86-3196 against Gerstin. Under the first and second approaches described in the Gerstin Petition, pp. 10-11, the

partial consolidation of that case with the Colonial case (which was not then finally resolved) did not affect the time for appeal as to Gerstin. If the first notice of appeal was not premature in the Gerstin case, then the D.C. Circuit's dismissal of that appeal in April 1988 (App.B, 23a), when left unchallenged, terminated the case for Gerstin. A second notice of appeal, filed seven months later in November 1988, could not save or resurrect the appellate court's jurisdiction.

Not only is this case a proper vehicle to review the conflict among circuits, but this is a proper and timely point for this Court to review the D.C. Circuit's determination of the issue.

The court of appeals has squarely addressed the point, and no further illumination will come out of requiring Gerstin to go through the uncertainty and expense of trial. Under the circumstances, it would be a flagrant waste of time, effort, money and judicial resources to require a trial and yet another appeal on the same point, to an appellate court that has already spoken on the subject, in order to present that question for review by this Court. This is the appropriate time and case to resolve an important and properly presented issue of federal jurisdiction, which continues to divide the circuits.

B. The Issue of Noncompliance With Federal Rule 4, Governing the Form and Service of Summons, Is Properly Presented

Respondents, implying that the service of process issue raised by MLDC is not ripe for review, argue that the court of appeals did not really allow the district court to assert jurisdiction over MLDC. (Br.Opp.7). However, the district court had already held that it had jurisdiction. The appellate court's failure to require dismissal because of the inadequate service has, in effect, condoned a legally erroneous view of the requirements of Fed.R.Civ.P. 4. Rule 4(j) strictly mandates dismissal unless valid service was made within 120 days (absent good cause shown), and respondents had the burden of proof to establish timely

compliance. *Light v. Wolf*, 816 F.2d 746, 751 (D.C. Cir. 1987).

It is the position of MLDC that allowing service of process directed to a co-defendant subsidiary ever to suffice as the basis for asserting in personam jurisdiction over the parent corporation directly contravenes the teaching of *Omni Capital International v. Rudolph Wolff & Co.*, 484 U.S. 97 (1987), and the specific requirements of Rule 4. Significantly, respondents do not contest this point in their opposition brief. Respondents also do not dispute the importance of this issue of federal jurisdiction and procedure, as discussed in MLDC's petition (pp. 17-18), nor do they disagree that the rulings below conflict with *Gottlieb v. Sandia American Corp.*, 452 F.2d 510 (3rd Cir.), *cert. denied*, 404 U.S. 938 (1971), and decisions in other circuits.

This is an appropriate time to review the Rule 4 issue. If the district court on remand does not withdraw its earlier ruling (App.H, 47a-48a), MLDC will be forced to litigate the entire case, then appeal and possibly seek certiorari, just to obtain a proper ruling that *in personam* jurisdiction was never established in the first place. The issue is an important one, squarely presented, and should be accepted for review.

C. The D. C. Circuit's Application of Havens Needs Reexamination By This Court.

Respondents' primary argument is that the decision below correctly applied the "continuing violation" doctrine of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). (Br.Opp.9-10). If true, it affirmatively demonstrates the need for review by this Court.

To support their position, respondents have seized on the ambiguous phrase "last asserted occurrence" used in the *Havens* opinion. *Id.*, 380-81. "Occurrence" may describe either a specific action or the passive result or consequence of action. In *Lorance v. AT&T Technologies*, 104 L.Ed.2d 961 (1989), the Court held that the mere appearance of adverse consequences flowing from earlier discriminatory conduct is not enough, and at least one

separate violative act within the limitations period must be established in order to invoke the continuing violation exception. If these three critical words from *Havens* mean something other than a discrete act in violation of law, they appear to be inconsistent with *Lorance*; if not, then the D.C. Circuit has misconstrued and misapplied *Havens*.[1] Either way, the Court should clarify this important issue concerning the judicially-created exception to the limitations statute enacted by Congress.

Since the petitions for certiorari were filed, the U.S. Court of Appeals for the Fifth Circuit has decided *Hendrix v. City of Yazoo City*, 911 F.2d 1102 (5th Cir. 1990), which petitioners believe to be supportive of their view of the law and in conflict with the D.C. Circuit's ruling. *Hendrix* says that a facially neutral act which gives effect to prior discrimination is not covered by the continuing violation exception. *Id.*, 1104.

Both the trial court and the appellate court in this case indicated that the mere publication of one advertisement with only white models would be unlikely to make out a case of discriminatory advertising in violation of the Fair Housing Act. (App. A, 19a n.6; App. F, 36a-37a). Respondents claim that so-called "all white" advertising continued into the 180-day limitations period "by at least one day."[2] (Br.Opp.4). Petitioners believe the mere appearance of one facially neutral advertisement, where there is no evidence of intent to discriminate by deliberately excluding black models, is not the discrete discriminatory act within the limitations period that permits application of the continuing violation exception, either under *Havens* or under *Lorance*.

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[1] *See also Ragin v. Steiner, Clateman and Associates, Inc.*, 714 F.Supp. 709, 711-12 (S.D.N.Y. 1989), distinguishing *Lorance* and holding that date printed on newspaper, rather than date on which advertiser placed order for ad, triggers limitation period.

[2] Respondents were aware of petitioners' advertising before that day, having filed complaints with the Department of Housing and Urban Development and the D.C. Office of Human Rights on April 24, 1986—182 days preceding the first lawsuit against petitioners.

It is clear, especially in light of *Hendrix*, that the continuing violation doctrine needs further clarification by this Court, as it is a recurring problem over which the circuits disagree and involves an important question of federal law.

D. Petitioners' Evidence Met Summary Judgment Requirements, and the Record Is Adequate For Review of the Legal Issues.

Respondents for some reason make a big point that their discriminatory advertising claims were sufficient to survive a Rule 12(b)(6) motion to dismiss.[3] (Br.Opp.10-12). The well-reasoned decision by District Judge Harold Greene did not hold that the complaints failed to state a claim but instead granted summary judgment, based on the facially nondiscriminatory nature of the individual ads together with the absence of any extrinsic proof of discriminatory intent or any statistical imbalance during the limitations period. (App.F, 38a-39a).

Contrary to respondents' theory (Br.Opp.15-16), the remand by the D.C. Circuit does not mean the issues are prematurely presented or unsuitable for review. The record made below was complete for summary judgment purposes and is adequate for decision by this Court. Numerous decisions of major import have been rendered by this Court in cases arising in a similar or identical procedural pos-

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[3] Respondents criticize petitioners for failure to bring to the Court's attention a regulation of the Department of Housing and Urban Development, 24 C.F.R. § 109.30. (Br.Opp.11-12). However, respondents' quotation of § 109.30 (Br.Opp.vii) is incomplete and misleading, omitting the key introductory paragraph which explains that "the Assistant Secretary will consider the implementation of fair housing policies and practices provided in this section as *evidence of compliance* with the prohibitions against discrimination in advertising. . . ." 24 C.F.R. §109.30 (1980) (emphasis added). The regulation, in effect, provides a "safe harbor" for advertisers who come under scrutiny by the Department and does not purport to apply in private litigation. *See* App.F, 39a. Respondents argued unsuccessfully below that the regulations established a mandatory quota system under which the models depicted in real estate advertising had to be proportionate to the racial makeup of the surrounding metropolitan area. That argument was properly rejected. (App.F, 35a).

ture.[4] The court of appeals has rendered its judgment on the issues presented,[5] and there is no compelling reason to defer review of the issues until all possible proceedings below are exhausted.

E. The "Counterstatement" Does Not Accurately Reflect the Proceedings and Establishes No Valid Reason To Deny Review.

Respondents in their "Counterstatement of the Case" make various assertions regarding the proceedings below and the state of the decisional record. (Br.Opp.2-8). These points are largely incorrect and do not warrant denial of review by this Court.

1. Respondents' recitation of the procedural history is inaccurate and misleading: (a) A considerable factual record was compiled in the district court through summary judgment procedures, including detailed factual affidavits and exhibits. (b) The district court never restricted discovery in any manner. (c) The district court's scheduling order (issued more than three months after the complaint was filed) did not address merely *preliminary* motions but established a clear deadline for "any and all dispositive motions by any party". (S.App.L, 59a). (d) Respondents filed their own dispositive motion within the deadline and clearly knew the import of the district court order. (S.App. M, 62a). (e) Attorney William Jeffress' Rule 56(f) affidavit,

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[4] *See e.g., Havens Realty Corp. v. Coleman, supra* (addressing continuing violation and standing issues in Fair Housing Act case before discovery and final judgment); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (certiorari granted to review appellate decision remanding Title VII case dismissed by district court as untimely); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977) (same); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986)(certiorari granted after D.C. Circuit reversed summary judgment for defendants); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (same); *Lujan v. National Wildlife Federation*, 111 L.Ed.2d 695 (1990) (certiorari granted and D.C. Circuit ruling upholding plaintiff's standing reversed prior to trial or final judgment).

[5] The First Amendment issues were extensively briefed by both sides below. Colonial adopted by reference the argument made in Gerstin's brief rather than repeat the points needlessly. (S.App.N, 69a).

indicating only a generalized need for discovery regarding speculative and peripheral matters (*Id.*, 62a-63a), was insufficient to postpone consideration of the pending motions in light of the scheduling order and respondents' failure to initiate discovery of any kind.[6] (f) The record contains all competent evidence the parties saw fit to submit on the cross-motions for summary judgment.

2. The fact that respondents sought no factual discovery is attributable singly to their own litigation strategy. During seven months while the district court litigation was pending, respondents had ample opportunity to initiate discovery but made no effort to do so. Respondents never addressed pre-1985 advertising, and they led the court of appeals to believe the only periods at issue were from January, 1985 to April or May, 1986. (App.A, 20a).

3. The complaints filed by respondents specifically dealt with advertising which appeared "during the past 180 days, and prior thereto". (S.App.M, 60a). Petitioners established that "no conceivable violation" occurred in the limitations period. (App.F, 39a). Respondents' statement that petitioners did not primarily address the merits below is incorrect. Petitioners indeed did introduce competent evidence to disprove any practice of deliberately "excluding" black persons from their advertising. (App.I, 50a-53a).[7]

4. The district court obviously did not agree with respondents' interpretation of *Havens*. Without evidence

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[6] *See United States v. Bob Stofer Oldsmobile-Cadillac, Inc.*, 766 F.2d 1147, 1152-53 (7th Cir. 1985); *Paul Kadair, Inc. v. Sony Corporation of America*, 694 F.2d 1017 (5th Cir. 1983).

[7] Counsel's representation that respondents offered to settle their claims "for $3,000 or less" including fees and costs (Br.Opp.3 n.2) is inaccurate. No such offer was ever received by petitioners. On the contrary, the record shows that respondents' attorneys demanded $10,000 or more to settle with Gerstin prior to litigation. (S.App.M, 61a-62a). In any event, demanding only $1000 to $3000 from each of the 80 or more targets of respondents' boilerplate administrative complaints filed in the District of Columbia, at peril of being sued in federal court, demonstrates the potential for strike-suit abuse. *See also* Gerstin Pet. 20-21 n.5.

that a discrete violation of law occurred within the 180-day limitations period, it found no basis for waiving the statutory bar to respondents' pre-limitations period claims. Petitioners do not disagree that the entire question of how and under what circumstances the continuing violation exception should apply definitely needs clarification, if not plenary reexamination.

5. Colonial's brief to the D.C. Circuit argued that the district court correctly held that a Fair Housing Act advertising claim required *either* an obvious message of discrimination or proof of "extrinsic circumstances which implicate a discriminatory intent." (S.App.N, 69a-70a). Colonial's position before this Court is the same, and there is no basis to suggest its argument was ever waived. The fact is that respondents made no effort to prove the existence of discriminatory intent, and Colonial proved there was none. Judge Greene found Colonial's ads were not facially discriminatory and entered summary judgment for it.

6. Faced with Colonial's properly supported motion, respondents had to present "specific facts" showing a triable issue as to at least one affirmative violation within the limitations period, in order to invoke the continuing violation doctrine and escape summary judgment. Fed.R.Civ.P.56(e); *Celotex Corp. v. Catrett, supra*, 477 U.S. at 323. All they could point to was one advertisement, showing a white couple, which appeared in the *Washington Post* on Saturday, April 26, 1986—the 180th day preceding their lawsuit. As a matter of simple logic, that was not enough. Petitioners provided no evidence that Colonial took any specific action within the limitations period, and no inference of such action could fairly be drawn. Colonial's petition does not misstate the facts but simply points out the factual and logical shortcomings of respondents' proof and the D.C. Circuit's analysis.

7. Colonial's description of the individual plaintiff's standing allegations is virtually identical to the court of appeal's description. (App.A, 9a n.2). Even as character-

ized by respondents (Br.Opp.6), those allegations were not sufficient at the threshold to establish standing. *Lujan v. National Wildlife Federation, supra; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

8. Standing was explicitly raised and briefed in *Spann v. Gerstin*, Civil Action No. 86-3196. (S.App.M, 61a, 64a-65a). Respondents replied with legal arguments supporting Professor Spann's standing based on the allegations of their initial pleadings—nowhere suggesting any need for amended pleadings or further development of the record. (S.App.M, 63a-64a). Since the Gerstin case was consolidated for purposes of briefing with *Spann v. Colonial Village, Inc.*, Civil Action No. 86-2917 (S.App.L, 59a), there was no reason for Colonial to repeat Gerstin's points as to the individual plaintiff's lack of standing. The court of appeals also consolidated the two parallel appeals before it, and Gerstin continued to emphasize the standing problem in that forum. (S.App.N, 66a-68a). Respondents again fully briefed this issue—again not suggesting any need to amend their pleadings or supplement their evidence. (*Id.*, 70a-72a). Instead they argued that merely seeing the ads, thereby suffering deprivation of the right to "non-preferential advertising", was enough by itself to confer standing. (*Id.*). In view of the consolidation of these appeals there again was no need for Colonial separately to brief the same issue. (S.App.K, 57a). In short, Colonial never waived its right to object to the individual plaintiff's lack of standing.

9. The district court record contains ample and compelling evidence that MLDC was never properly served. (App.I, 53a-55a). If the record is "thin", it is so only in regard to the complete absence of evidence to support respondents' position. In noting that no more than a Colonial executive's business card was cited to connect MLDC to the forum (App.A, 17a), the court of appeals should have dismissed it from the suit at once. It was up to the respondents to prove the adequacy of their purported service of process. Having failed to do so, they have no right

to demand that MLDC participate in any judicial proceedings. The court of appeals suggested that discovery might be permitted on remand "concerning the character of Colonial's advertising and affiliations with MLDC" (App.A, 18a), but such discovery is irrelevant and would lend no new insights to the fundamental defects in the form and service of the summons raised in MLDC's petition.

10. In the court of appeals, respondents did not specify as an issue presented for review any alleged error in the district court's holding that their efforts to serve process directly on MLDC were ineffective. (S.App.N, 66a). MLDC specifically pointed out that the district court's ruling that MLDC was never directly served "has not been challenged on appeal" (S.App.N, 70a n.18). Respondents did not thereafter state any disagreement, nor did they make any argument for the validity of their attempts to serve MLDC directly. (S.App.N, 72a).

11. Respondents miss the point in their brief discussion of the appellate jurisdiction issue. Once the first appeal was erroneously dismissed as to Gerstin, that case would have been over under the approach of at least five judicial circuits, unless respondents took some prompt action to preserve their rights of appeal. Respondents do not disagree that the circuits are in sharp conflict over the effect of partial consolidation in the trial court. Proper resolution of that question controls whether the D.C. Circuit had jurisdiction of respondents' second appeal against Gerstin.

12. Petitioners did not discuss the HUD regulation on Fair Housing Advertising, 24 C.F.R. § 109.30, because it is not relevant. *See* note 3, *supra*. The court of appeals did not find respondents' reliance on the regulation important enough to mention, and the district court considered and rejected respondents' contention as wholly insubstantial. (App.F, 35a-36a).

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7118

Girardeau A. Spann, *et al.*,

Appellants

v.

Colonial Village, Inc., *et al.*

No. 87-7119

Girardeau A. Spann, *et al.*,

Appellants

v.

Marvin J. Gerstin, *et al.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED JUNE 30, 1987
GEORGE A. FISHER
CLERK

ORDER

It appearing that above captioned cases may have the same or similar issues, it is

ORDERED, *sua sponte*, that these cases are hereby consolidated.

SUPPLEMENTAL APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7257

Girardeau A. Spann, *et al.*,

Appellants

v.

Colonial Village, Inc., *et al.*

No. 88-7260

Girardeau A. Spann, *et al.*,

Appellants

v.

Marvin J. Gerstin, *et al.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED JAN. 5, 1989
CONSTANCE L. DUPRE
CLERK

ORDER

It is ORDERED *sua sponte*, that the above captioned cases are hereby consolidated.

SUPPLEMENTAL APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2917

Girardeau A. Spann, *et al.*,

Plaintiffs,

v.

Colonial Village, Inc.,

Defendant.

Civil Action No. 86-3196

Girardeau A. Spann, *et al.*,

Plaintiffs,

v.

Marvin J. Gerstin, *et al.*,

Defendants.

Civil Action No. 86-3268

Girardeau A. Spann, *et al.*,

Plaintiffs,

v.

Howard Bomstein, *et al.*,

Defendants.

Filed Jan. 30, 1987
Clerk, U.S. District Court
District of Columbia

ORDER

In light of the fact that the above-captioned cases are related as defined in Local Rule 405(a) of the Local Rules of this Court, the Court will consolidate these cases for purposes of briefing, and it will also establish a joint briefing schedule for dispositive motions in all three cases. Accordingly, it is this 30th day of January, 1987

ORDERED that the above-captioned cases be and they hereby are consolidated for purposes of briefing; and it is further

ORDERED that any and all dispositive motions by any party in the above-captioned cases shall be filed on or before February 22, 1987, and that failure to do so constitutes waiver of the right to file such motions; and it is further

ORDERED that oppositions to any dispositive motions shall be filed on or before March 10, 1987; and it is further

ORDERED tha replies to oppositions shall be filed within five days after service of the memorandum in opposition.

/s/
HAROLD H. GREENE
United States District Judge

SUPPLEMENTAL APPENDIX M

[EXCERPTS FROM DISTRICT COURT RECORD]

COMPLAINT [Civil Action 86-2917]

* * *

4. Plaintiff Girardeau A. Spann is a black resident of the District of Columbia who has been looking for housing in the District of Columbia metropolitan area during the period covered by this Complaint.

* * *

13. During the past 180 days, and prior thereto, plaintiff Girardeau A. Spann viewed real estate display ads published in *The Washington Post* including those of Colonial Village and was offended by those ads due to their clear indication of racial preference.

14. On April 24, 1986, plaintiffs filed an administrative complaint challenging Colonial Village's racially preferential advertisements. . . .

16. As a result of the racially preferential advertising appearing in *The Washington Post*, including Colonial Village's ads, plaintiff Girardeau A. Spann has incurred indignation, distress and deprivation of his rights to nonpreferential advertising and to obtain housing on an equal basis with other persons regardless of race.

* * *

DEFENDANTS' MOTION TO STRIKE, SEAL OR EXPUNGE AND IN LIMINAE, MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Defendants, Marvin J. Gerstin and Marvin Gerstin Associates, Inc., by counsel, respectfully move for the reasons set forth in the accompanying memorandum and under F.R.C.P. Rules 12 and 56 that this Court:

* * *

2. Dismiss the Complaint due to the plaintiffs' lack of standing which deprives the Court of jurisdiction. . . .

* * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE, SEAL OR EXPUNGE AND IN LIMINAE, MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

* * *

V. PLAINTIFFS LACK STANDING TO BRING THIS LAWSUIT

Both the individual plaintiff as well as the two organizational plaintiffs lack standing to bring this lawsuit.

* * *

Here, the only "distinct and palpable injury" alleged by plaintiff Spann has been the reading of *Washington Post* advertisements. Complaint ¶¶ 24 and 26.

* * *

AFFIDAVIT OF MARVIN GERSTIN

* * *

8. I was present at a conference at the District of Columbia Office of Human Rights where plaintiffs' attorneys stated that from $1,000.00 to $3,000.00 attorneys fees were being required as part of each settlement with the 80 respondents in the case that plaintiffs had filed before the Office. In special cases such as mine, additional attorneys fees would be required to settle the case. In my presence, my attorney asked plaintiffs' counsel Rory Little, Esq. and Kerry Scanlon, Esq. the hourly basis of plaintiffs' fee claim. Mr. Little and Mr. Scanlon refused to provide the information. At the conference, plaintiffs' counsel said that Marvin Gerstin Associates, Inc. would have to pay

attorneys' fees in the five figures to settle the case. More recently, I have received a written demand, through my attorney, from Mr. Little demanding attorney's fees of $3,000.00 plus $7,000.00 for an alleged breach of a prior agreement. * * *

[Execution date December 15, 1986]

DECLARATION OF WILLIAM H. JEFFRESS, JR., ESQ. PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(f)

* * *

2. Plaintiffs' actions against the defendants in Civil Action No. 86-2917 and Civil Action No. 86-3196 were filed on October 23, 1986 and November 20, 1986, respectively. The defendants in CA No. 86-3196 subsequently filed a Motion to Dismiss or for Summary Judgment asserting numerous threshold objections to plaintiffs' claims for relief, including defenses based on the First Amendment, the statute of limitations and standing. Recognizing that plaintiffs' claims in CA No. 86-2917 were closely related and that defendants in that action might raise similar legal defenses, the Court consolidated the actions and established a joint briefing schedule. Pursuant to that briefing schedule, Colonial Village, a defendant in CA No. 86-2917, also filed a Motion to Dismiss, For Judgment on the Pleadings, or For Summary Judgment.

3. In light of the preliminary but potentially dispositive objections raised by defendants, plaintiffs have devoted their limited legal resources to preparing an adequate factual and legal response and presenting their own Motion for Summary Judgment. . . . Although plaintiffs have been able to identify some of Gerstin's ads on information and belief, discovery is necessary for plaintiffs to identify and verify all Gerstin's ads. Plaintiffs will also seek to discover further evidence, in addition to defendants' responsibility for all-white human model ad campaigns and the long-

standing HUD regulations warning against this type of advertising, that defendants acted with willful and wanton disregard for plaintiffs' statutory rights.

4. As a result of the above, plaintiffs are not in a position at this time to present numerous facts in the exclusive control of defendants, concerning, for example, the identity and content of all Gerstin's advertisements, and the intent and ill will of defendants in publishing all-white human model ad campaigns.

* * *

[Dated March 16, 1987]

CORRECTED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS, FOR JUDGMENT ON THE PLEADINGS, AND FOR SUMMARY JUDGMENT

For this case to meet the Article III "case or controversy" requirement, this Court need only find that one plaintiff has demonstrated standing. [Citations omitted] In this case, however, all the plaintiffs have standing. . . .

A. Professor Spann's Standing As An Individual

Professor Spann clearly has standing in this case and only Gerstin raises any question on this point. The Complaints allege that Professor Spann, a black person in search of housing in the Washington area, suffered "indignation and distress" when he saw the "clear indications of racial preference" in the defendants' advertisements. Gerstin Complaint ¶¶ 24, 26; Colonial Village Complaint ¶ 16. Accepting the allegations in the Complaints as true, the defendants' all-white housing advertisements "stigmatiz[e]" blacks as "innately inferior" when they suggest that blacks are unwelcome as prospective purchasers. Such "stigmatizing injury" has been held to constitute a serious non-economic injury sufficient to confer standing. [Citations omitted] Moreover, Fair Housing Act was passed

specifically to "eliminate the humiliation and social cost of racial discrimination." [Citation omitted]. . . .

Professor Spann has also suffered a "deprivation of his right to non-preferential advertising and his right to obtain housing on an equal basis with other persons regardless of race." . . . This provides an additional and independent injury conferring standing. Even where no injury would otherwise exist, the Supreme Court has held that the "actual or threatened injury required by Art III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth*, 422 U.S. at 500 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Section 3604(c) of the Fair Housing Act establishes an enforceable right to "advertisement[s] with respect to the sale or rental of a dwelling" that do not "indicate any preference, limitation, or discrimination based on race." 42 U.S.C. § 3604(c). By virtue of defendants' racially preferential advertising, Professor Spann has suffered injury in precisely the form the statute was intended to guard against," and has standing to challenge those unlawful practices. . . .

* * *

GERSTIN DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, FOR JUDGMENT, AND FOR SUMMARY JUDGMENT

* * *

VIII. PLAINTIFFS CANNOT HAVE STANDING WITHOUT INJURY

It is important to note what plaintiffs do not allege:

1. There is no allegation that any plaintiff . . . has been misled by any of defendants' advertising, believe or have been led to believe by the defendants or anyone else that they are not entitled to rent or purchase housing wherever they choose.

2. There is no allegation that any of the real estate projects advertised by these defendants discriminate in any way.

3. There is no allegation that any plaintiff . . . has even had an interest in living in the real estate projects advertised.

4. There is no allegation that any of the real estate developments advertised are not fully integrated.

5. There is no allegation that the neighborhoods or communities where the advertised real estate projects are located are not fully integrated.

Plaintiffs' complaint is that they don't like what they read in the newspaper.

Because of what he didn't see in the newspapers—enough black models—Professor Spann has hurt feelings. * * *

While damages for emotional distress may flow from a discrimination injury, there must first be such injury. Here, plaintiffs have suffered no legally cognizable injury.

Under plaintiffs' legal theories, every resident or potential resident of the Washington Metropolitan area would have standing to sue and every reader of the newspaper would, like Professor Spann, be able to recover for his offense to real estate advertisements that he believes to be underinclusive of his or her protected group.

* * *

SUPPLEMENTAL APPENDIX N

EXCERPTS FROM COURT OF APPEALS RECORD, Nos. 88-7257, 88-7260 (Consolidated Appeals)

APPELLANTS' BRIEF

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does a challenge to a longstanding practice of publishing all-white human model real estate advertising state a claim under Section 3604(c) of the Fair Housing Act, given HUD's interpretation that all-white advertising falls within the prohibitions of that Section?

2. Did the district court contravene the "continuing violation" rule established in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), by finding these complaints untimely, notwithstanding that plaintiffs alleged a longstanding discriminatory practice that continued into the limitations period?

3. Did the district court err in holding that the plaintiffs must provide evidence of discriminatory intent to prove a violation of Section 3604(c)?

4. Do the 1988 Amendments to the Fair Housing Act apply to plaintiffs' claims, thereby providing them full remedies equivalent to those provided by the Civil Rights Act of 1866?

* * *

BRIEF FOR APPELLEES MARVIN GERSTIN ASSOCIATES, INC. AND MARVIN GERSTIN

* * *

VI. THE PLAINTIFFS LACK STANDING

The Gerstin defendants raised other grounds below that also support the District Court's ruling. One of the most

important is the fact that the plaintiffs lacked standing to bring this action.

It is important to note what plaintiffs do *not* allege:

1. There is no allegation that any plaintiff . . . has been misled by any of defendants' advertising, believe or have been led to believe by the defendants or anyone else that they are not entitled to rent or purchase housing wherever they choose.

2. There is no allegation that any of the real estate projects advertised by these defendants discriminate in any way.

3. There is no allegation that any plaintiff . . . has ever had an interest in living in the real estate projects advertised.

4. There is no allegation that any of the real estate developments advertised are not fully integrated.

5. There is no allegation that the neighborhoods or communities where the advertised real estate projects are located are not fully integrated.

Plaintiffs' complaint is that they don't like what they read in the newspaper. Because of what he didn't see in the newspapers—enough black models—Professor Spann has hurt feelings. . .

While damages for emotional distress may flow from a discrimination injury, there must first be such injury. Here, plaintiffs have suffered no legally cognizable injury.

Under plaintiffs' legal theories, every resident or potential resident of the Washington Metropolitan area would have standing to sue and every reader of the newspaper would, like Professor Spann, be able to recover for his offense to real estate advertisements that he believes to be underinclusive of his or her protected group. . . .

Under Article III of the United States Constitution, in order to establish standing to sue in a federal court a

litigant must satisfy a three-part test. He must show (1) that he has suffered a personal injury, (2) that the injury is fairly traceable to the defendant's alleged conduct, and (3) the injury is likely to be redressed by the judicial relief sought. . . .

The injury alleged must be "distinct and palpable. . . " [Citation omitted] "[A] litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.' " *Id.*

Here, the only "distinct and palpable injury" alleged by plaintiff Spann has been the reading of *Washington Post* advertisements. . . .

* * *

BRIEF FOR DEFENDANTS-APPELLEES COLONIAL VILLAGE INC. AND MOBIL LAND DEVELOPMENT CORPORATION

* * *

Again plaintiffs must rely on a *per se* violation theory. . . . Their case boils down to a claim that six prototype ads, each depicting one or two persons, which were run sporadically in the newspaper over a period of 16 months, violated the federal anti-discrimination law solely because none of the individuals shown happened to be indentifiable as a black person.

Without showing more, plaintiffs cannot prevail under section 804(c). As District Judge Greene observed, the *per se* theory is illogical, among other reasons because it would prohibit developers from using a single prototype ad, showing a single white person but no black person, without the slightest evidence that the ad is discriminatory in effect or intent. . . . The practical consequences of adopting plaintiff's view, some of which are described in the district

court's opinion, make it most unlikely that Congress intended such a result.[12]

* * *

3. The District Court Did Not Impose Any Requirement That Plaintiffs Prove Discriminatory Intent To Establish Their Claim Under Title VIII

Plaintiffs berate the district court for supposedly imposing a burden on plaintiffs in all Title VIII cases to prove discriminatory intent. . . . District Judge Greene is portrayed as "the only federal judge who believes that intent is required to be shown" in these cases. . . . However, Judge Greene made no such holding. The gratuitous attack by plaintiffs, taking his words out of context and distorting their plain meaning, is irrelevant and unnecessary to the appeal.

What the district court actually said was that a violation of section 804(c) may be established *either* by proof of an "obvious" message of discrimination conveyed in the ad *or* by proof of extrinsic circumstances which implicate a discriminatory intent and message in advertising. This approach is entirely consistent with prevailing jurisprudence under Title VIII, including the "disparate impact" doctrine. [Citation omitted] The issue of intent creates no basis for reversal, since plaintiffs were not required and did not try to establish intent in this case. [Footnote omitted]

Plaintiffs elected to forego pursuit of the second alternative approach described by Judge Greene and to focus exclusively on what they contend is "obvious" discrimination, based simply on the race of individuals pictured in the challenged advertising. Deliberately framing this as a

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[12] In addition, plaintiffs' interpretation of section 804(c) would raise serious First Amendment problems, as the district court noted. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). This concern is to be addressed more fully in the Gerstin appellees' brief.

test case of their *per se* theory of liability, they made no effort to prove that the advertising actually had any disparate effects on readers or that it was racially motivated. The district court found, according to the proof, that neither obvious discrimination nor an intent to indicate a racial preference existed in Colonial Village advertising during the limitations period. (J.A. 156). This finding is supported by undisputed evidence and is not challenged in this appeal.

* * *

Mobil Land Development Corporation moved for dismissal of the complaint under Rule 4(j) on grounds that it was not served within 120 days. The district court ultimately denied that motion and held that MLDC was effectively served, based on two factors: (1) MLDC's awareness of the litigation; and (2) the previous accomplishment of service on MLDC's wholly-owned subsidiary, Colonial Village, Inc. (J.A. 173-174).[18]. . .

* * *

APPELLANTS' REPLY BRIEF

* * *

THE PLAINTIFFS HAVE STANDING

As the Supreme Court has made clear, the "sole requirement" for standing under the Fair Housing Act "is the Art. III minima of injury in fact," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), a requirement satisfied here by each plaintiff. [Footnote omitted]

Mr. Spann viewed defendants' all-white real estate ad campaigns appearing in *The Washington Post*, and as a result suffered a deprivation of his statutory right "to nonpreferential advertising." . . . This injury to his statutory

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[18] The district court expressly found that all other attempts to serve MLDC were invalid, and this ruling has not been challenged on appeal.

right, *by itself*, is plainly sufficient to confer standing under the Fair Housing Act. As the Supreme Court has repeatedly recognized, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " [Citations omitted] Section 3604(c) creates such a right of standing to challenge discriminatory housing advertisements. The Supreme Court has held that even a "tester," who has no "intention of buying or renting a home," and who was acting for the purpose of gathering information to support litigation, has standing to pursue violations of Section 3604(d) of the Act prohibiting untruthful information about the availability of housing. *Havens Realty*, 455 U.S. at 374. "Just as the tester in *Havens Realty* suffered a statutorily recognized injury when he received an unlawful representation, so did [Mr. Spann] receive an injury under the Act when [he] received an unlawful advertisement indicating a . . . preference based on race." [Citation omitted].[7]

* * *

Gerstin contends that this Court should disregard this basis for standing because "every reader of the newspaper, like Professor Spann, [would] be able to recover for his offense to real estate advertisements." . . . Although it is true that discriminatory newspaper advertising adversely affects many people, that is no reason to immunize such conduct from legal challenge. Otherwise there would not be a specific provision of the Fair Housing Act making

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[7] Mr. Spann also has standing because he was offended and distressed by the defendants' use of all-white advertising campaigns and their indication of racial preference. J.A. at 13, 22. He interpreted the absence of blacks from human model ad campaigns as a clear signal that the development so advertised did not want to sell to him or other black persons. *See* J.A. at 12, 22. The "stigmatizing injury" suffered by Mr. Spann as a result of viewing defendants' all-white ads constitutes a serious non-economic injury sufficient to confer standing. [Citation omitted]

illegal "newspaper advertisements indicating a racial preference." [Citation omitted]

* * *

DEFENDANTS' PROCEDURAL ARGUMENTS HAVE ALREADY BEEN REJECTED BY THIS COURT

Remarkably, both groups of defendants attempt once again to raise the same procedural arguments already rejected by this Court, in yet another effort to delay or prevent a decision on this appeal. * * *

Each of the procedural arguments defendants now raise has already been weighed and rejected in a considered decision by a motions panel of this Court, which included Chief Judge Wald among its members. . . . While defendants argue that this Court is "not bound" by that decision, . . . defendants have not presented anything to show that this Court *should* revisit the panel's decision on these issues. * * *

The strongest rationale that might exist for reconsidering the motions panel's decision—that the "doctrine of 'law of the case' does not apply to the fundamental question of subject matter jurisdiction," [Citation omitted]—is absent in this case. Mobil and Colonial Village present only two arguments for dismissal on procedural grounds: The absence of a separate judgment under Rule 58; and service of process objections under Rule 4(j). Neither of these is the type of jurisdictional question that must be raised by the Court *sua sponte*. [Citations and footnote omitted]

* * *